STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: June 26, 2024)

DIVINE INVESTMENTS, INC.,	:	
Appellant,	:	
	:	
v.	:	**C.A. No. PC-2023-03472**
	:	
TOWN OF JOHNSTON; TOWN OF JOHNSTON ZONING BOARD OF REVIEW; ANTHONY PILOZZI, in his capacity as a Member of the Town of Johnston Zoning Board of Review; CHARLES AINABE, in his capacity as a Member of the Town of Johnston Zoning Board of Review; JOSEPH ANZELONE, in his capacity as a Member of the Town of Johnston Zoning Board of Review; RICHARD FASCIA, in his capacity as a Member of the Town of Johnston Zoning Board of Review; THOMAS LOPARDO, in his capacity as Chairperson of the Town of Johnston Zoning Board of Review; and EDWARD CIVITO, in his capacity as the Building/Zoning Official for the Town of Johnston,	:	
Appellees.	:	

DECISION

LANPHEAR, J. Before this Court is Appellant Divine Investments, Inc.'s (Divine) appeal from the June 28, 2023 decision of the Johnston Zoning Board of Review denying its application for dimensional variances. Jurisdiction is pursuant to G.L. 1956 § 45-24-69. For the reasons set forth herein, Divine's appeal is denied, and the Board's decision is affirmed.

I

Facts and Travel

Though the record is sparse, the Court gleans the following facts: On April 29, 2023, Divine filed an application requesting dimensional variances for rear yard setback and area requirement to develop a single-family home on a vacant lot located at 0 Theresa Avenue, Johnston, Rhode Island, Tax Assessor's Plat 11, Lot 579.[1] *See* R. (Application) 1-3. The property is considered a substandard lot of record, located in a Residence R-15 District,[2] and was purchased on December 22, 2021, although Divine is developing it. *Id*. at 2; *see* R. (Decision) 1; Johnston Code of Ordinances, Art. II, Sec. 340-62(A), Substandard lots of record. Theresa Avenue, which provides the only route of access to the property, is a one-way street during certain times of the day as it is located near a school. (Decision 2.)

Because the property is 10,500 square feet and the minimum lot size in the R-15 District is 15,000 square feet, Divine requested relief of 4,500 square feet. *See* Art II, Sec. 340-9, Table of Dimensional Regulations. The rear yard setback requirement is 45 feet, and Divine's proposed design includes a rear yard setback of only 12.5 feet, therefore Divine requested relief of 32.5 feet. *Id*.

The Board heard the application on May 25, 2023. On June 2, 2023, prior to the Board's written decision, the Town Planner submitted a letter to the Board stating that a

[1] The Application lists the lot number as 579 while the Board's Decision lists the lot number as both 359 and 539. *Compare* Application 1, *with* Decision 1, ¶ 1.

[2] A Residence R-15 District "is composed of certain medium-density residential areas where similar development appears desirable." Johnston Code of Ordinances, Art. II § 340-5(C).

prior application to develop a single-family home on the property was denied.[3] The letter adds that "[t]his [current] request appears to meet all the requirements of Section 340-74 Criteria for variances" as well as the amended section 340-62. (Attachment filed on March 15, 2024.)

On June 28, 2023, the Board rendered its decision denying the application. *See* Decision 1. The Board did not note the prior application in its decision. In his motion to deny the application, Board member Mr. Pilozzi added that "one of the people here with [Divine]" testified that "the lot [was] subdivided many years ago and left this piece there which [became] an eyesore there, but without access[.]" *Id*. at 2. Mr. Pilozzi also noted that the application was "not in compliance with 340, code 941. It's not the least relief necessary," specifically noting the concerns with the one-way street access to the property. *Id.*

Divine appealed the Board's decision to this Court on July 19, 2023. *See* Compl. The Court will now turn to the issues on appeal.

II

Standard of Review

The Superior Court's review of local zoning board decisions is governed by § 45-24-69(d) which provides:

> "The court shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact. The court may affirm the decision of the zoning board of review or remand the case for further proceedings, or may reverse or modify the decision if

[3] Typically, the doctrine of administrative finality bars a subsequent application for substantially similar relief without a substantial or material change in circumstances. *Audette v. Coletti*, 539 A.2d 520 (R.I. 1988). Appellant argues that "the Application was not denied, rather, it was continued and never heard again." *See* Divine's Br. 2.

> substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are:
>
> "(1) In violation of constitutional, statutory, or ordinance provisions;
>
> "(2) In excess of the authority granted to the zoning board of review by statute or ordinance;
>
> "(3) Made upon unlawful procedure;
>
> "(4) Affected by other error of law;
>
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or
>
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Section 45-24-69(d).

On review, the Court is "limited to a search of the record to determine if there is any competent evidence upon which the agency's decision rests. If there is such evidence, the decision will stand." *E. Grossman & Sons, Inc. v. Rocha*, 118 R.I. 276, 285-86, 373 A.2d 496, 501 (1977). Thus, the Court must "examine the whole record to determine whether the findings of the zoning board were supported by substantial evidence." *Apostolou v. Genovesi*, 120 R.I. 501, 507, 388 A.2d 821, 824 (1978). "Substantial evidence . . . means 'such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance.'" *Lischio v. Zoning Board of Review of Town of North Kingstown*, 818 A.2d 685, 690 n.5 (R.I. 2003) (quoting *Caswell v. George Sherman Sand & Gravel Co., Inc.*, 424 A.2d 646, 647 (R.I. 1981)).

III

Analysis

A

Applicability of Amended Statutes

As an initial matter, Divine argues that the amended versions of both §§ 45-24-41 and 45-24-38(b) are applicable and were not properly considered by the Board. *See* Divine's Br. 7. As to § 45-24-41, Divine asserts that the Board erred in determining that the relief requested was not the least relief necessary because that factor no longer existed as of January 1, 2024. *Id*. Divine also argues that the newly amended components of § 45-24-38(b) apply and therefore the "location and shape of the [p]roperty is a unique hardship to the lot and not a result of any action taken by [Divine]." *Id*. at 5. Because the appropriate standard to be applied on appeal is "the law in effect at the time when [Divine] submitted its application" absent a "clear expression of retroactive application," the versions of the statutes as they were in April 2023 apply. *East Bay Community Development Corporation v. Zoning Board of Review of Town of Barrington*, 901 A.2d 1136, 1144 (R.I. 2006). Thus, the Board did not err in considering whether the relief was the least relief necessary, and Divine's argument regarding § 45-24-38(b) is without merit.

B

Review of the Board's Decision pursuant to § 45-24-41

In deciding whether to grant an application for a dimensional variance, the Board,

> "shall require that evidence to the satisfaction of the following standards is entered into the record of the proceedings:

> "(1) That the hardship from which [Divine] seeks relief is due to the unique characteristics of the subject land or structure and not to the general characteristics of the surrounding area; and is not due to a physical or economic disability of [Divine], excepting those physical disabilities addressed in § 45-24-30(a)(16);
>
> "(2) That the hardship is not the result of any prior action of [Divine] and does not result primarily from the desire of [Divine] to realize greater financial gain;
>
> "(3) That the granting of the requested variance will not alter the general character of the surrounding area or impair the intent or purpose of the zoning ordinance or the comprehensive plan upon which the ordinance is based; and
>
> "(4) That the relief to be granted is the least relief necessary." Section 45-24-41(d).

Moreover, the Board must find that there is evidence on the record showing "that the hardship suffered by the owner of the subject property if the dimensional variance is not granted amounts to more than a mere inconvenience." Section 45-24-41(e)(2). As to each of the above requirements, the burden is on the applicant "seeking relief . . . to prove the existence of the conditions precedent to a grant of relief." *DiIorio v. Zoning Board of Review of City of East Providence*, 105 R.I. 357, 362, 252 A.2d 350, 353 (1969).

Divine argues that the Board did not make the required substantive findings. Divine does not go so far as to say that there was evidence necessitating such findings. The Board argues that Divine did not place any evidence of probative value on the record for it to consider. The Board further notes that "[t]he record [was] deplete of facts to consider." (Board's Br. 4.) The decision made findings of fact only as to points Divine addressed during the limited presentation at hearing. On appeal, Divine has not produced a transcript nor pointed to specific evidence that was ignored by the Board's decision. It

is Divine's burden to produce such evidence that the Board can rely on and, without such evidence, there is no conflict for the Board to resolve on unaddressed issues. *See DiIorio*, 105 R.I. at 362, 252 A.2d at 353.

Turning to the factors enumerated in § 45-24-41(d), the Court easily disposes of the first and second factors, as well as whether the hardship suffered, if not granted, amounts to more than a mere inconvenience under § 45-24-41(d)(2). These factors were not established by Divine through evidence on the record.

Next, Divine argues that the hardship is due to the unique characteristics of the land and was not self-created, yet there is little to no evidence in the record supporting this argument. Though the lot is uniquely small and was left vacant for some time, Divine did not provide any evidence in the form of testimony that the hardship was not from its prior action or that the requested relief was not primarily for financial gain. Further, Divine did not establish that the property was not subdivided by it, how it came into possession of such property, and its plans for the property. The decision stated that "one of the people here with [Divine]" testified that "the lot [was] subdivided many years ago and left this piece there which [became] an eyesore there, but without access," but Divine did not provide any evidence disputing this or proving this was not the case. (Decision 2.) Finally, there is no mention anywhere in the record or in the parties' filings that establish that the hardship suffered would result in more than a mere inconvenience. Although the Board did not explicitly refer to these factors in its decision, this Court finds that Divine did not meet its burden in providing facts sufficient to warrant the Board make such conclusions, and the Board was not required to do so in light of its decision to deny the application. *See* § 45-24-41(d).

Divine then suggests that granting the variances will not alter the general character of the neighborhood, as single-family homes are allowed in the R-15 District. *See* Divine's Br. 6-7. The Board found that "[Divine] did not call any professional or expert witnesses to testify as to the type or size of home[.]" (Decision 2.) Moreover, Mr. Pilozzi stated that "[the Board has not] gotten any expert testimony as to how [Divine is] going to get [to the property]," stressing his concern with the times when Theresa Avenue is a one-way street. *Id*.

In reviewing the evidence in the record, the Court recognizes that Divine's renderings of the proposed structure itself appear to show a proposal in conformity with the rest of the neighborhood. *See* R. (Preliminary Plans). Regardless, the Board did not err in finding that the relief, if granted, would be incompatible with the area due to the difficulties in accessing the property. Although the Board did not address the Town's Comprehensive Plan, Mr. Pilozzi stressed that Theresa Avenue, the only road that can access the property, is utilized by the school department. *See* Decision 2. He added that Divine "would need permission to get down that one way or to change it somehow and our board doesn't have the authority [to] do anything with that" and that "[he] can't even see [Divine] getting to the property yet." *Id*. Thus, in viewing the substantial evidence in the record, the Board properly denied the application based on its incompatibility with the surrounding area.

In determining whether the relief was the least relief necessary, Mr. Pilozzi stated multiple times that it was not, basing his opinion primarily on the fact that the only access to the property was through the one-way street. *See* Decision 2. Again, Divine failed to provide any type of evidence indicating that this was the least relief necessary. There is

no evidence that Divine could not avoid the setback line deviation, make the footprint of the home smaller, or limit the size of the dwelling. *See New Castle Realty Company v. Dreczko*, 248 A.3d 638, 648-49 (R.I. 2021) (because a smaller home could have been considered, the Supreme Court upheld the trial justice's ruling that the requested relief was not the least relief necessary). Accordingly, there is substantial evidence in the record to support the Board's denial based on the relief not being the least relief necessary.

While the Board's decision should have been more explicit, the Board did not err in denying the application based on the substantial evidence in the record. As stated above, Divine provided minimal facts for the Board to rely on and the Board made the findings it could with the evidence it was provided.

IV

Conclusion

For the reasons stated herein, Divine's appeal is denied and the Board's decision denying its application for dimensional variances is upheld.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Divine Investments, Inc. v. Town of Johnston, et al.**
CASE NO:	**PC-2023-03472**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**June 26, 2024**
JUSTICE/MAGISTRATE:	**Lanphear, J.**
ATTORNEYS:	
For Plaintiff:	**John O. Mancini, Esq.**
For Defendant:	**Joseph R. Ballirano, Esq.**